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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/518,957	06/27/2005	Jesus Ruben Abril	2997-46-PUS	2644
70/960	7/5/90	06/01/2009		
SHERIDAN ROSS P.C. 1560 BROADWAY SUITE 1200 DENVER, CO 80202				
EXAMINER				
PADEN, CAROLYN A				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
06/01/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/518,957

**Applicant(s)**

ABRIL ET AL.

**Examiner**

Carolyn A. Paden

**Art Unit**

1794

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 31 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 91-125 and 150-161 is/are pending in the application.
- 4a) Of the above claim(s) 126-149 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 91-126, 150-161 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

Claim 91 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. There is no antecedent basis in claim 91 for "the oil emulsion" in line 7. An amendment to the claim changing "the oil emulsion" to –the oil-in-water-emulsion- would overcome the rejection.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 91-95, 98-101, 104-117, 122-123 and 125 rejected under 35 U.S.C. 103(a) as being unpatentable over Nakajima (7,029,719) as further evidenced by Firestone.

Nakajima discloses a mayonnaise-like food that is oil in water emulsion (column 4, lines 14-19). Emulsifiers (column 2, lines 54-58) are included at a level of up to 5% (column 5, lines 29-32). The stabilizers in claim 101 are included as in the composition as thickening polysaccharides in Nakajima at column 5, lines 12-15). Soybean and sesame seed oil are used as oil sources in Nakajima.

The claims appear to differ from Nakajima in the recitation of polyunsaturated oil and in the recitation that the composition is not heat treated. Both soybean oil and sesame oil are known in the art to contain polyunsaturated fatty acids. Evidence of the polyunsaturated fatty acids in sesame and soybean oil is provided by Firestone. It is appreciated that Nakajima heat treats his mayonnaise but there is no requirement to heat treat fresh mayonnaise that is for immediate use. It would have been obvious to one of ordinary skill in the art to omit heating the mayonnaise of Nakajima so it can be immediately consumed as fresh mayonnaise. It is also appreciated that "solution" is not mentioned but this is a preamble limitation, carrying no weight in the product claim. It is appreciated that all of the weight ratios of the claims are not mentioned but one of ordinary skill in the art would be expect to optimize the amount of each ingredient according to the extent of calories and according to the extent of stability desired in the product.

Claims 91-125 and 150-161 rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for an aqueous solution or an oil solution, does not reasonably provide enablement for a solution that is oil in water emulsion. The

specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to use the invention commensurate in scope with these claims. Further examiner does not believe that it is technically correct to refer to an emulsion of oil and water to also be a solution.

Claims 91-95, 98-120, 122-125, 150-161 are rejected under 35 U.S.C. 103(a) as being unpatentable over Traska (6423363) as further evidenced by Firestone.

Traska discloses an aqueous dispersion of plant sterols and lipids. The dispersion is contemplated for use in spreads, dressings, beverages and dairy products (column 4, lines 3-7). The surfactants used in the product are disclosed at column 6, lines 8-15 to be the same as those required in claim 98 and the suggested surfactant level is disclosed at column 6, lines 24-25 to be within that required in claim 1. The emulsions stabilizers set forth in claim 101 are included in Traska as a further ingredient at column 7, lines 11-29). Vitamins and preservatives are contemplated in Traska at column 7, lines 44-50. Low pH products are suggested at column 8, lines 57-62. A water continuous spread (oil in water emulsion) is disclosed at example 4. No restriction is placed on the particular fat or oil used in

the product (column 6, lines 60-67). Heat treatments are not mentioned in example 4. The claims appear to differ from Traska in the recitation of an oil component that is a polyunsaturated fatty acid. It is well known in the art that vegetable oils contain an abundance of polyunsaturated fatty acids. Evidence for this statement is provided by Firestone. Firestone shows the fatty acid content of soybean oil and sesame oil. It would have been obvious to one of ordinary skill in the art to use the aqueous dispersion of Traska as the emulsion of the claims in light of the Firestone evidence to the presence of unsaturated fatty acids in soybean oil (example 6 of Traska). It is appreciated that antimicrobial agents are not mentioned but it is known in the art to include antimicrobial agents to extend the shelf life of a food. It is also appreciated that the particular weight ratios of oil to water and emulsion stabilizer are not mentioned but given the variety of foods prepared in Traska, it would have been obvious to modify the ratios of ingredients in Traska according to the particular emulsion desired. Fortification of foods with nutrients and flavors is a way to enhance the utility of foods. No unobvious or unexpected result is seen from the stability of the emulsion because it is well known in the art to prepare foods with an extended storage life.

Claims 96, 97 and 121 are rejected under 35 U.S.C. 103(a) as being unpatentable over Traska as further evidenced by Firestone as applied to claims 91-95, 98-120, 122-126 and 150-157 above, and further in view of Kohn (2005/0129739) or Kyle (5,658,767).

The claims also appear to differ from Traska as further evidenced by Firestone in the selection of oils from genetically modified sources, i.e. microbial and plant sources. Although natural oil sources are used in Traska, oils from microorganisms and genetically modified plants are known in the art, as shown by Kohn and Kyle. It would have been obvious to one of ordinary skill in the art to utilize the oils of Kohn and Kyle in order to enhance the nutritive quality of the food.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the

end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.



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For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794